Re the estate of Yap Hong Kai, deceased (Yap Teck Ngian, petitioner)

HIGH COURT (TEMERLOH) — PETITION NO 31–38 OF 1995
RAMLY ALI JC
2 NOVEMBER 2001

Civil Procedure *— Administration of estates — Letter of administration — Action for revocation of letter of administration — Citation against administrator — Whether court must consider merits of application to revoke letter of administration before issuing citation — Whether prior entry of caveat in Form 173 required — Whether citors had to initiate application for citation by summons — Rules of the High Court 1980 O 72 rr 7 & 8*

Succession *— Letters of administration — Revocation of grant — Citation against administrator — Whether court must consider merits of application to revoke letter of administration before issuing citation — Whether prior entry of caveat in Form 173 required — Whether citors had to initiate application for citation by summons — Rules of the High Court 1980 O 72 rr 7 & 8*

One Yap Swee Keng ('YSK') died in 1964. The appellant's late father, Yap Hong Kai ('YHK') was granted a letter of administration to administer the estate of YSK. The administration of YSK's estate was not fully completed when YHK died. A piece of property owned by YSK ('the land') was not completely administered by YHK and the land was registered in YHK's name as 'representative'. In the meantime, the appellant was granted a letter of administration to administer the estate of YHK. The list of assets of the estate of YHK as exhibited in the letter of administration included the land. The citors, who were the beneficiaries of the estate of YSK, claimed that the grant of the letter of administration to the appellant was defective as the appellant had, amongst others, failed to inform the court that the land was held by YHK as the administrator of the estate of YSK. The citors intended to file a writ against the appellant to cancel or revoke the grant of the letter of administration of the estate of YHK so as to prevent the appellant from distributing the land to YHK's children and to enable the citors to claim their interests in respect of the land. Before the writ could be issued, the citors applied for the issuance of a citation under O 72 rr 7 and 8 of the Rules of the High Court 1980 ('the RHC'). The court accordingly issued the citation and directed the appellant to bring into and leave at the Registry of the High Court, YHK's letter of administration for the purpose of the citors' writ. The appellant applied to set aside the citation but the senior assistant registrar ('the SAR') dismissed the appellant's application. The appellant appealed against the decision of the SAR.

Held, dismissing the appeal:

(1) The present case before the court was in respect of the application for issuing a citation. The action for revoking the grant, which had to begin by writ, had not been filed yet. The court need not

consider the full merits of the application to revoke the grant at the present stage of issuing a citation as there would be a separate hearing and consideration of the merits when the writ was filed and fixed for hearing at a later stage (see p 196F–G).

(2) What the citor needed to do at this stage of the proceedings was to file an affidavit sworn by the citor verifying the statements of fact to be made in the citation as required under O 72 r 8(2) of the RHC. In the instant case, the citor's affidavit contained all the relevant and material facts that were needed to support an application for a citation (see pp 196G–H, 197C).

(3) For a citation under O 72 r 7 of the RHC, the prior entry of a caveat in Form 173 of the RHC was not required. It was only logical that since the object of a caveat was to prevent the issue of a grant of representation without notice to the person who had entered it, the entry of a caveat was only applicable in the case of a fresh application for the grant of the representation, but not after the grant. The caveat would serve no purpose at all in the present case as the letter of administration had already been granted to the appellant and the citors' application was to revoke the grant (see pp 199H–200A); *Re Tay Tuan, deceased* [1962] MLJ 285 distinguished.

(4) The citors need not initiate their application for citation by summons as stipulated in O 72 r 18 of the RHC. Order 72 r 18 of the RHC was applicable only if there were no other provisions providing otherwise. The procedures for applying for a citation were contained in O 72 r 8 of the RHC and there was no mention therein that the application for a citation had to be made by summons. Secondly, the requirement under O 72 r 18 of the RHC was not mandatory as the word 'may' was used instead of 'shall' or 'must'. Further, O 72 r 18 of the RHC was only applicable in an application to the court in a 'probate cause or matter'. The words 'probate cause' must be referring to 'probate action' as defined in O 72 r 1(2) of the RHC, which meant an action for the grant of probate or letters of administration or for revocation of such grant or for a decree pronouncing for or against the validity of an alleged will. Therefore, the expression 'probate cause' did not include the present application for the issue of a citation under O 72 r 7 of the RHC (see p 201D–H).

[Bahasa Malaysia summary

Pada tahun 1964 seorang bernama Yap Swee Keng ('YSK') telah meninggal dunia. Mendiang bapa perayu, Yap Hong Kai ('YHK') telah diberikan surat pentadbiran untuk mentadbir harta pesaka YSK. Pentadbiran harta pesaka YSK tidak disempurnakan sepenuhnya ketika YHK meninggal dunia. Sebidang hartanah yang dimiliki oleh YSK ('tanah tersebut') telah tidak ditadbirkan sepenuhnya oleh YHK dan tanah tersebut telah didaftarkan atas nama YHK sebagai 'wakil'. Sementara itu, perayu telah diberikan surat pentadbiran untuk

A mentadbir harta pesaka YHK. Senarai aset-aset harta pesaka YHK seperti mana yang diekshibitkan di dalam surat pentadbiran termasuk tanah tersebut. Pihak-pihak 'citor', yang merupakan benefisiari-benefisiari harta pesaka YSK, menuntut bahawa pemberian surat pentadbiran kepada perayu adalah tidak sempurna kerana perayu telah, antara lainnya, gagal untuk memaklumkan mahkamah bahawa tanah B tersebut telah dipegang oleh YHK sebagai pentadbir harta pesaka YSK. Pihak-pihak 'citor' berniat untuk memfailkan satu writ terhadap perayu untuk membatalkan geran surat pentadbiran harta pesaka YHK bagi menghalang perayu daripada mengagihkan tanah tersebut kepada anak-anak YHK dan bagi membolehkan pihak-pihak 'citor' untuk menuntut kepentingan mereka berhubung dengan tanah tersebut. Sebelum writ C tersebut boleh dikeluarkan, pihak-pihak 'citor' telah memohon untuk pengeluaran suatu 'citation' di bawah A 72 kk 7 dan 8 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah sehubungan itu mengeluarkan 'citation' dan mengarahkan perayu untuk membawa kepada dan meninggalkan di Pejabat Pendaftaran Mahkamah Tinggi, D surat pentadbiran YHK bagi tujuan writ pihak-pihak 'citor'. Perayu telah memohon untuk mengetepikan 'citation' tersebut tetapi penolong kanan pendaftar ('PKP') telah menolak permohonan perayu. Perayu merayu terhadap keputusan PKP tersebut.

E **Diputuskan**, menolak rayuan tersebut:

(1) Kes semasa di hadapan mahkamah adalah berhubung dengan permohonan untuk mengeluarkan satu 'citation'. Tindakan untuk membatalkan geran tersebut, yang mana haruslah dimulakan melalui writ, masih belum difailkan. Mahkamah tidak perlu mempertimbangkan merit sepenuhnya permohonan tersebut F untuk membatalkan geran tersebut di peringkat semasa pengeluaran satu 'citation' kerana akan terdapat perbicaraan yang berasingan dan pertimbangan merit apabila writ tersebut difailkan dan ditetapkan untuk perbicaraan di peringkat yang terkemudian (lihat ms 196F–G).

G (2) Apa yang perlu dilakukan oleh pihak-pihak 'citor' di peringkat prosiding ini adalah untuk memfailkan satu afidavit yang telah diikrarkan oleh pihak-pihak 'citor' yang menentusahkan pernyataan-pernyataan fakta yang harus dibuat di dalam 'citation' tersebut seperti mana yang diperlukan di bawah A 72 k 8(2) KMT. Dalam kes semasa, afidavit pihak-pihak 'citor' H mengandungi semua fakta relevan dan material yang diperlukan untuk menyokong suatu permohonan untuk satu 'citation' (lihat ms 196G–H, 197C).

(3) Untuk satu 'citation' di bawah A 72 k 7 KMT, kemasukan sesuatu kaveat terdahulu dalam Borang 173 KMT tidak I diperlukan. Adalah munasabah bahawa oleh kerana tujuan sesuatu kaveat adalah untuk menghalang pengeluaran satu geran wakil tanpa notis kepada orang yang telah memasukkannya,

kemasukan sesuatu kaveat hanya boleh dilakukan dalam permohonan baru untuk geran wakil, tetapi tidak selepas pemberiannya. Kaveat tersebut tidak akan berguna sama sekali dalam kes semasa kerana surat pentadbiran telah pun diberikan kepada perayu dan permohonan pihak-pihak 'citor' adalah untuk membatalkan geran tersebut (lihat ms 199H–200A); *Re Tay Tuan, deceased* [1962] MLJ 285 dibeza.

(4) Pihak-pihak 'citor' tidak perlu memulakan permohonan mereka untuk 'citation' melalui saman-saman seperti mana yang ditetapkan di dalam A 72 k 18 KMT. Aturan 72 k 18 KMT boleh dipakai hanya jika tidak terdapat peruntukan-peruntukan lain yang memperuntukkan sebaliknya. Prosedur untuk memohon bagi mendapatkan 'citation' terkandung di dalam A 72 k 8 KMT dan tidak disebut di dalamnya bahawa permohonan untuk sesuatu 'citation' haruslah dibuat melalui saman. Kedua, syarat di bawah A 72 k 18 KMT tidak mandatori kerana perkataan 'may' telah digunakan dan bukannya perkataan 'shall' atau 'must'. Selanjutnya, A 72 k 18 KMT hanya boleh dipakai di dalam sesuatu permohonan kepada mahkamah dalam sesuatu 'probate cause or matter'. Perkataan-perkataan 'probate cause' semestinya merujuk kepada 'probate action' seperti mana yang ditakrifkan di dalam A 72 k 1(2) KMT, yang bermaksud sesuatu tindakan untuk geran probet atau surat-surat pentadbiran atau untuk pembatalan geran yang sedemikian atau untuk satu dekri yang mengumumkan untuk atau terhadap kesahihan sesuatu wasiat yang dikatakan itu. Oleh yang demikian, ungkapan 'probate cause' tidak termasuk permohonan semasa untuk pengeluaran satu 'citation' di bawah A 72 k 7 KMT (lihat ms 201D–H).]

Notes

For a case on procedure regarding letters of administration, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 190.

For cases on revocation of a grant of letters of administration, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1943–1951.

Cases referred to

Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)

Tay Tuan, Re, deceased [1962] MLJ 285 (distd)

Legislation referred to

Probate and Administration Rules 1961 rr 38, (3), 39

Rules of the High Court 1980 O 1 r 4, O 32 r 1, O 71 rr 7, 37, (1), (3), 41, (3), 42(1), (3), 43(1), O 72 rr 1(2), 2(1), (3), 5, 7, 8, (1), (2), (3), (4), 15(3), 18, O 93 r 1(b)

A Rules of the Supreme Court 1934 O 25, O 26
Rules of the Supreme Court 1965 [Eng] O 76 rr 4, 7, 8

K Maniam (*Skrine*) for the appellant.
Francis Tan (*Rosni Francis Tan & Co*) for the respondents.

B **Ramly Ali JC**: This is an appeal to the judge in chambers against the decision of the learned senior assistant registrar ('SAR') made on 19 February 2001 in dismissing the appellant's application to set aside and to cancel the citation dated 29 November 2000 issued pursuant to O 72 rr 7 and 8 of the Rules of the High Court 1980 ('the RHC').

C For the purpose of this appeal, the appellant, who at the material time was the administrator of the estate of his late father, one Yap Hong Kai (deceased), is the citee while the respondents who at the material times were the brothers and sisters of the said Yap Hong Kai (deceased), are the citors.

Brief facts

D One Yap Swee King @ Yap Swee Kim @ Yap Swee Keng ('YSK') died on 2 October 1964. The appellant's late father, Yap Hong Kai ('YHK') and all the citors are children of the said YSK. At the time of YSK's death, the beneficiaries were his wife, one Tan Sok Hun, and all his children (which include YHK and all the citors). On 21 May 1968, the said YHK was granted a letter of administration to administer the estate of the said YSK. E However, on 1 November 1993, the said YHK died. The administration of the estate of YSK (where YHK was the administrator) was not fully completed when YHK died. The citors claimed that one of the properties of the said YSK which was not completely administered by YHK at the time of his death was a piece of land held under GM 210 Lot 432 Sek 9, Sungai F Ara, Mukim Mentakab, Pahang. The said land was and is still registered under the name of the said YHK as 'representative'. On 2 February 1996, the appellant was granted a letter of administration to administer the estate of the said YHK. The list of assets or properties of the said estate of YHK as exhibited in the said letter of administration were: (i) land held under GM 706 Lot 430 Sek 9, Sungai Ara, Mukim Mentakab Pahang, and G (ii) land held under GM 210 Lot 432 Sungai Ara, Pahang.

The citors claimed that the said grant of the letter of administration to the appellant was defective on the grounds that:

(i) the appellant failed to inform the court that his late father, YHK was an undischarged bankrupt at his death. An adjudicating order ('AO') H and a receiving order ('RO') to that effect were made against YHK on 30 April 1979;

(ii) the appellant failed to inform the court that the land held under GM 706 Lot 430, Sek 9, Sungai Ara, Mukim Mentakab, Pahang in fact belonged to the state government as declared by the High Court in I Temerloh on 30 January 1996; and

(iii) the appellant failed to inform the court that the land held under GM 210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang was in

fact held by the said YHK only as 'representative' as the administrator of the estate of YSK. A

The first citor has applied for a letter of administration 'de bonis non' in respect of the unadministered estate of the said YSK vide Mahkamah Tinggi Temerloh, Petition No 31–26–1999, involving the said land held under GM 210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang. The application is still pending. In the meantime, the citors intended to file a writ against the appellant to cancel or revoke the said grant of the letter of administration of the estate of YHK which was granted to the appellant on 2 February 1996. This was to stop the appellant from distributing the said properties among his brothers and sisters (children of the said YHK) and to enable the citors to claim their interest in respect of the said land which they claimed still to be in the estate of YSK which was not administered when YHK died. For that purpose and as a condition precedent, before the said writ can be issued, the citors have on 31 October 2000 applied for the issuance of a citation under O 72 rr 7 and 8 of the RHC 1980. On 29 November 2000, the court issued the said citation, directing the appellant to bring into and leave at Registry of the High Court the said letter of administration for the purpose of the citors' writ for its revocation or cancellation which will be filed and determined later. On 15 December 2000, the appellant filed a summons in chambers to set aside or to cancel the said citation. On 19 July 2001, after hearing both sides, the learned SAR dismissed the said application by the appellant with costs. Hence, this appeal. B C D E

In coming to the above summary of facts, I have considered all the relevant affidavits filed by both sides, particularly the affidavit dated 31 October 2000 sworn by the citors (encl 39) and the affidavit dated 2 March 2001 sworn by the appellant (encl 50) and their respective exhibits attached thereto. In doing so, I am guided by the following decision in *Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, where the Supreme Court held: F

> There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted.

In another case, *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332, Shanker J held: G

> Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted.

Appellant's submissions H

The appellant's counsel submitted that the said citation issued in favour of the citors' application should be set aside on the grounds that:

(i) the citors' complaints did not disclose any grounds or justification to support their application for cancellation or revocation of the said grant of the letter of administration earlier granted to the appellant; and I

(ii) the citation was applied for and issued not in accordance with the procedure under the RHC, in that the citors have not entered any

caveat before issuing the citation and that the citation must be applied by way of a summons.

In respect of ground (i), the appellant submitted that the circumstances under which an action for revocation of grants may be brought are:

(i) where it is alleged that the will was not a valid one;

(ii) where a later will revoking the earlier will or duly executed revocatory instrument has been discovered;

(iii) where it has been discovered that the deceased married since the date of the will which was the subject matter of the grant of probate, or where letters of administration had been granted without the deceased's marriage having been known;

(iv) where it is alleged that the grant was obtained by a person or persons not entitled to such a grant.

To support this submission, the appellant's counsel relied on some passages from text books by *William Mortimer and Sunnucks on Executors, Administrations and Probate* (17th Ed) at p 404 and *Probate and Administration in Singapore and Malaysia: Law and Practice* by G Raman (Malayan Law Journal Sdn Bhd, 1991) at p 82.

The appellant argued that the grounds raised by the citors in the present case cannot be used to support his intended application to cancel or revoke the said grant of the letter of administration.

On ground (ii), the appellant's counsel submitted that the citors' application for a citation was irregular as there was no caveat entered before issuing such citation. To support this submission, the appellant relies on O 71 r 41 of the RHC; text books *The Law of Wills, Probate Administration and Succession In Malaysia and Singapore* by Mahinder Singh Sidhu (p 228), *William Mortimer and Sunnucks on Executors, Administrators and Probate* (7th Ed) at p 390 and a case law: *Re Tay Tuan, deceased* [1962] MLJ 285. The appellant's counsel also submitted that all applications for citations must be made by summons, as in form 62. He further submitted that in the present case, the citors failed to comply with such requirements. To support this submission, the appellant relied on O 72 rr 7, 18 and O 32 r 1 of the RHC.

Respondents' (citors) submissions

The citors' counsel, on the other hand, argued that procedure for revocation of a grant (as in the present case) is provided under O 72 rr 1(2), 2(1) and (3) of the RHC; whereby such an action must be begun by writ, and such writ shall not be issued unless a citation under O 72 r 7 of the RHC has been issued. In other words, the present case is only at the stage of issuing a citation, not the hearing of the writ for revocation of the grant yet. Such a writ had not been filed yet. The writ will only be filed after citation has been issued by the court. On that premise, the citors' counsel argued that the question whether the citors' have disclosed any ground or justification to support their application for revocation of the grant does not arise at this stage. The issue is only material and relevant at the hearing of

the writ proper, not at the present stage of issuing a citation. At this stage, the relevant issue is whether the said citation was validly issued in accordance with the relevant rules.

On the question of caveat, the citors' counsel argued that since the application for citation was made under O 72 rr 7 and 8 of the RHC, being a contentious probate proceeding, it does not require a caveat to be entered before issuing a citation. He further argued that such a requirement for caveat is only relevant and applicable for application for a citation under O 71 of the RHC, ie for non-contentious probate proceeding before a grant of a letter of administration is given out to any party.

Issues

The following issues need to be determined by the court, namely:

(i) whether the citors need to disclose grounds or justification to support their application for revocation of the said grant of the letter of administration at this stage of the proceedings, ie at the stage of issuing a citation;

(ii) whether a caveat needs to be entered before issuing a citation in the present case; and

(iii) whether an application for the issuance of a citation (as in the present case) must be made by a summons.

First issue: Grounds for revocation of the grant

The first issue relates more to the merit of the application by the citors to revoke the said grant. This application, which must be begun by writ, had not been filed yet. Before this writ can be issued, a citation under O 72 r 7 of the RHC must have been issued first. One must appreciate the difference between these two actions; ie (i) an action to revoke the grant; and (ii) an application for issuing a citation, which is a precondition to the issue of the first action. The present case before this court is in respect of the application for issuing of a citation. Therefore, I am of the view that the court need not consider the full merits of the application to revoke the said grant at the present stage of issuing a citation. There will be a separate hearing and consideration for the merits when the writ is filed and fixed for hearing at a later stage.

What the citors need to do at this stage of the proceeding is to file an affidavit sworn by the person applying for a citation to be issued (the citor) verifying the statements of fact to be made in the citation, as required under O 72 r 8(2) of the RHC. To that effect the citors have sworn an affidavit dated 31 October 2000 (encl 39) to support their applications for a citation under O 72 r 7 and 8 of the RHC (encl 38). Basically, the said affidavit contains the averments that:

(i) the said land held under GM 210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang, was and is still a property belonging to the estate of YSK, not the estate of YHK;

(ii) the said land held under GM 706 Lot 430, Sek 9, Sungai Ara, Mukim Mentakab, Pahang was and still belongs to the state government, not the estate of YHK;

(iii) the said YHK, at the time of his death, was an undischarged bankrupt;

(iv) that the first citors applied for a letter of administration 'de bonis non' in respect of the unadministered estate of the said YSK vide Mahkamah Tinggi Temerloh, Petition No 31–26–1999;

(v) that citors intend to file a writ against the appellant to revoke the said grant of a letter of administration earlier granted to him on 2 February 1996; and

(vi) the citation is to direct the appellant to bring into and leave at the registry the letter of administration earlier granted to the appellant.

I have scrutinized the contents of the citors' affidavit (encl 39) and am satisfied that it contains all the relevant and material facts that it needs to support, an application for a citation at this stage. Therefore, it is not appropriate for me to consider the full details of the merit of the writ which is yet to be filed, at the present stage.

Second issue: Caveat

In order to determine whether a caveat needs to be entered before a citation is issued, we need to consider the relevant rules and laws relating to the issuance. At the present time the relevant rules relating to the matter are to be found in the RHC, particularly O 71 and O 72. Originally, the relevant rules were provided under the Rules of the Supreme Court 1934 (O 25 and O 26). However, with effect from 15 February 1962, the said rules were replaced by the Probate and Administration Rules 1961 (rr 38 and 39). The said Probate and Administration Rules 1961 were repealed vide PU (A) 50/80, ie by O 93 r 1(b), of the present RHC when they came into force in 1980. The relevant provisions of O 72 rr 7 and 8 in our present RHC follow the provisions of O 76, rr 7 and 8 of the English Rules of the Supreme Court 1965. However, in 1980, O 76 rr 7 and 8 of the English Rules of the Supreme Court 1965 had been amended and substituted with O 76 r 4. There was no corresponding amendment to our relevant provisions of the RHC. Therefore, any reference made to the English law relating to the same matter after 1980, may not be applicable to our present position.

Order 71 of the RHC provides for procedures relating to non-contentious probate proceedings, while O 72 of the RHC provides for procedures relating to contentious probate proceedings. For the purposes of the RHC, 'probate proceedings' include proceedings in probate (where a will is involved) as well as proceedings for letters of administration (where no will is involved).

Order 1 r 4(1) of the RHC provides that a 'probate action' has the meaning assigned to it by O 72. Order 72 r 1(2) which provides:

> In these rules 'probate action' means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the

revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious. A

A citation is an instrument, signed by a registrar (SAR) and issued under the seal of the court, reciting that a cause or matter is before the court and the interest of the person extracting the citation and calling upon the party cited to enter an appearance and, in certain cases, to take some other steps therein specified, (see *William, Mortimer and Sunnucks on Executors, Administrators and Probate* (17th Ed) at p 388). B

For non-contentious probate proceedings under O 71 of the RHC, a citation may arise in three circumstances, namely:

(i) citation to accept or refuse to take a grant (O 71 r 42(1)), ie where a person who has a prior right to grant a probate or administration delays or declines to take it, but will not renounce his right, he maybe cited by a person having a right which is inferior to his, to accept or refuse the grant. C

(ii) citation to take a probate (O 71 r 42(3)), ie where an executor has intermeddled in the estate of the deceased and has not taken the grant interim six months of death, he may be cited to take probate by any person interested in the estate, unless proceedings as to the validity of the will is pending; D

(iii) citation to propound a will (O 71 r 43(1)), ie where a person genuinely believes that a will which has not been proved is invalid, and he himself is interested under an earlier will or an intestacy, may cite the executors and beneficiaries to propound it (see *Probate and Administration in Singapore and Malaysia: Law and Practice* by G Raman at pp 84–85). E

In citations in non-contentious probate matters under O 71 of the RHC, the citor must enter a caveat before the issue of the citations (O 71 r 41(3) of the RHC clearly provides for this requirement) (see also *Tristrom and Coote's Probate Practice* (23rd Ed) at p 5). Thus, in those circumstances, a citation cannot be issued unless and until the citor has entered a caveat. However, it must be stressed that this requirement under O 71 r 41(3) of the RHC is only for non-contentious probate proceedings under O 71. The provisions relating to caveat are to be found under O 71 r 37 of the RHC. Order 71 rr 37(1) and (3) provides that any person who wishes to ensure that no grant is made without notice to himself may enter a caveat, by filing the caveat form 173 in the registry. It is a notice in writing (Form 173) lodged at the Registry of the High Court. The object of a caveat is to prevent the issue of grant of representation without notice to the person by whom, or on whose behalf, the caveat is entered. F G H

The present case involves the citors' intended application by writ to revoke the grant of the letter of administration in respect of the estate of YHK which was granted to the appellant on 2 February 1996. By virtue of the definition of the words 'probate action' under O 72 r 1(2) of the RHC (which has been cited earlier), that proceeding is a probate action. It is a contentious probate proceeding as defined thereunder. Therefore, for the purpose of the present proceedings, the applicable rules are O 72, not O 71 I

of the RHC. A probate action under O 72 must be begun by writ and the writ must be issued out of the registry (O 72 r 2(1)). The citors' application for citation (encl 38) clearly indicates that the application was made under O 72 rr 7 and 8 of the RHC.

For contentious probate proceedings under O 72 of the RHC, a citation may arise in two circumstances, namely:

(i) citation to see proceedings (O 72 r 5), ie a citation issued, on the application of the plaintiff or any other person who has pleaded in a probate action, against any person not a party to the action who has an adverse interest to the applicant notifying him that if he does not enter an appearance in the action, judgment may be given therein without further notice to him; and

(ii) citation to bring in a grant (O 72 r 7), ie where, in an action for the revocation of the grant of probate of the will, or letters of administration, the person to whom a probate or letter of administration was granted, requiring him to bring into and leave at the registry the probate or letter of administration.

The present case involves an application by the citors for a citation under O 72 r 7, ie citation to bring in and to leave at the registry the letter of administration earlier granted to the appellant pending the determination of the citors' application by way of writ to revoke the said letter of administration.

Order 72 r 7 of the RHC provides:

> In an action for the revocation of the grant of probate of the will, or letters of administration of the estate of a deceased person, a citation against the person to whom the probate or letters of administration, as the case may be, was or were granted requiring him to bring into and leave at the Registry the probate or letters of administration, as the case may be, may be issued on the application of the plaintiff.

Order 72 r 8(1) provides that 'a citation under rr 5 or 7 must be issued out of the registry and must be settled by the court before it is issued'. Order 72 r 8(2) provides that 'before such a citation is issued, an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for it to be issued, provided that the court may in special circumstances allow the affidavit to be sworn by that person's solicitor.'

Order 72 r 8(3), further provides that 'issue of a citation takes place upon writs being sealed by an officer of the registry.' Unlike O 71, there is nothing under O 72 which mentions about caveats and the requirement that a caveat must first be entered before a citation can be issued. Therefore, I am of the view that for a citation under O 72, particularly r 7 thereof, the prior entry of a caveat, as applicable under O 71 for non-contentious probate proceedings, is not required. It is not a precondition to the issue of a citation under O 72 r 7 or the RHC. It is only logical that since the object of a caveat is to prevent the issue of a grant of representation without notice to the person who has entered it, it is applicable only in fresh applications for the grant of the representation, but not after the grant. The caveat serves no purpose at all in the present case, where a letter of administration has already been granted to

the appellant on 2 February 1996 and the citors' intended application is to revoke the said grant. In *MLJ Handbook Series 'Administration of Estates Handbook'*, author Kenneth Sundram states (at p 1202):

> Once representation has been granted to any petitioner and extracted, a caveat cannot be entered to stop any proceeding relating to the estate. In such a situation, the proceedings can only be stopped by revoking the grant of representation.

It is clearly not the intention of the rules committee to impose the requirement that a caveat must first be entered before a citation is issued under O 72 r 7 of the RHC. Otherwise, a similar provision as that of O 71 r 41(3) of the RHC, for a caveat to be entered before issuing a citation, must have been included somewhere in O 72.

The appellant's counsel cited the case of *Re Tay Tuan Decd* [1962] MLJ 285 to support his argument that a caveat needs to be entered before issuing a citation in the present case.

Re Tay Tuan, decd was decided by Adams J in Muar High Court on 20 June 1962. In that case, Adams J held (in delivering an oral judgment) that:

> The preliminary steps to be taken by a party who desires to obtain the revocation of a grant of letters of administration are: (i) enter a caveat; (ii) follow it with the extraction of a citation to the administrator to bring the grant into the registry. This should be followed by the issue of an originating motion.

In that case, a petition for a letter of administration was filed in 1951 vide Petition for LA no 98 of 1951. A letter of administration was granted in 1952. The decision of the court in dismissing the motion to revoke the grant was made on 20 June 1962. At that material time, when the decision was made, the relevant rules relating to the matter were found in the Probate and Administration Rules 1961 ('the PAR') (particularly rr 38 and 39) which came into effect on 15 February 1962. The said rules were repealed and substituted by the RHC since 1980 until today. The issue in question is purely a procedural matter, not a substantive matter. Therefore, the procedural laws and rules applicable in a particular case depends on the existing laws and rules applicable at the particular time when the case comes up. Rule 38(3) of the PAR clearly indicates that 'the citor shall enter a caveat before issuing a citation'. This requirement is in pari materia with O 71 r 41(3) of the present RHC (in relation to non-contentious probate proceedings). However, there is no corresponding separate provisions for non-contentious and contentious probate proceedings in the 1961 Rules as what we have in the present O 71 and O 72 of the RHC. In the present RHC, procedures for non-contentious and contentious probate proceedings are separated and differentiated — for non-contentious proceedings the procedures are under O 71 while for contentious proceedings the procedures are under O 72. Under O 72 of the present RHC, there is no mention about caveats and thus no requirement that a caveat must first be entered before a citation can be issued. That provision and requirement is only to be found in O 71, but not O 72. Therefore, I am of the view that the decision of Adams J in *Re Tay Tuan, deceased* may not

A be applicable to the present case on the ground that the case was dealing with a totally different set of applicable laws (at that time) compared to the present O 72 of the RHC.

Third issue: Application for citation by summons

B The appellant's counsel also submitted that the citors' application for a citation was bad and invalid. He argued that a citation may be issued under O 72 r 7 on the application of the citors. There must be a form of application. He further argued that under r 18 of the same O 71, except where these rules otherwise provide, any application to the court in a C probate cause or matter may be made by summons. He also argued that under O 32 r 1 of the RHC, every application in chambers must be made by summons in form 62. Therefore, the counsel concluded that the citors should have initiated their application for a citation under O 71 r 7 of the RHC by way of a summons as in form 62. He contended that the citors have failed to do so and that amounted to irregularity which cannot be cured and D thus, the said citation proceeding was null. The citors' counsel, on the other hand, argued that O 72 r 18 of the RHC is only applicable after a writ to revoke the grant has been filed in court. In the present case, the counsel argued that the writ in question has not been filed yet.

I am of the view that the citors need not initiate their application for a E citation under O 72 r 7 by summons as provided under r 18 of the same order. Firstly, r 18 is applicable only if there are no other provisions in the rules which provide otherwise. The procedures for applying for a citation is under O 72 r 8. Rule 8(2) provides that before such a citation is issued, an affidavit verifying the statement of fact to be made in the citation must be sworn by the person applying for it to be issued, provided that the court may F in special circumstances allow the affidavit to be sworn by that person's solicitor. There is no mention that the application under r 7 must be made by summons, as being provided for an application for discontinuance of a probate action under r 15(3) of the same order. Furthermore, I am also of the view that the requirement under r 18 is not mandatory. The rule uses the word 'may' instead of 'shall' or 'must'. If it is meant to be mandatory, G the word 'shall' or 'must' should have been used instead, as being used in O 72 r 2(1) and O 32 r 1 of the RHC. I am also in agreement with the citors' counsel that r 18 is only applicable to all applications after probate actions have been filed and initiated. Rule 18 refers to any application to the court in a 'probate cause or matters,' 'Probate cause' refers to 'probate action' as defined under O 72 r 1(2) which means an action for the grant of probate H or letters of administration; or for revocation of such grant or for a decree pronouncing for or against the validity of an alleged will. That being the case, it does not include a simple application for the issue of a citation under r 7 of the same Order, which arises at the stage before a writ is filed.

The said application may be made ex parte. It is only for the issuance I of a citation, and the issue of a citation takes place upon its being sealed by an officer of the registry. However, O 72 r 8(4) provides that a citation under rr 5 or 7 must be served personally on the person cited. This has been

done by the citors. The said citation requires the appellant to bring into and leave at the registry the letter of administration within eight days from the date when the citation was served on the appellant. The letter of administration is a document issued by the court upon application by the appellant as a petitioner. It is a court document. Therefore, it is only appropriate that the court requires the said letter of administration to be brought back and left at the court registry pending determination of an application to revoke the said letter of administration to be filed by way of a writ by the citors. This is to avoid abuses in the event the citors manage to prove their claims and are successful in their applications to revoke it. The citors have shown, through their affidavit, that they are interested parties in the sense that they are the rightful beneficiaries to the estate of YSK which they claimed to be left unadministered by the said YHK. One of them has applied for a letter of administration 'de bonis non' in respect of that unadministered estate of YSK.

Their next step after that is to claim the said property from the administrator of the estate of said YHK, for proper distribution among the beneficiaries of the said YSK. Therefore, the legality of the status of the appellant as an administrator of the estate of YHK must be confirmed and determined first. The citors' intended action to revoke the said grant of the letter of administration as well as the issue of a citation under O 72 r 7 is material and relevant towards that end.

There is also evidence in the citors' affidavit which shows that at the time of his death on 1 November 1993, the said YHK was an undischarged bankrupt. A letter dated 6 June 2000 from the Official Assignee's Office (exh H to encl 39) confirmed that the AO and RO had been issued against him on 30 April 1979 on the petition by Borneo Sumatra Trading Co.

By virtue of that, all assets and liabilities of the bankrupt are vested with the official assignee. Only the official assignee has the locus standi to deal with any matter relating to his assets and liabilities. No one else can do it without the consent of the official assignee.

Therefore, it is very vital to determine the locus standi of the appellant in this matter. That determination is best to be decided in all action by the citors to revoke the said grant of the letter of administration.

Conclusion

Having given this matter careful consideration, I am convinced that the learned SAR was right in dismissing the appellant's application (as in encl 42) to set aside the citation with costs. Therefore, I have no hesitation to dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Lim Lee Na